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Anwar al-Awlaqi and the Law of War

JURIST Contributing Editor **Jeffrey Addicott** of St. Mary's University School of Law says that despite the confusion as to whether US criminal law or the law of war should apply, the killing of Anwar al-Awlaqi was legal under the law of war, which must govern in this instance...

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The confusion associated with the legality of the recent **killing of Anwar al-Awlaqi**, al-Qaeda cleric and leader, by CIA drone strike in Yemen reflects very poorly on the US government. It is not because the killing was illegal as some have alleged, it is precisely the opposite. The killing **was perfectly legal**, and yet due to the inability of the Commander-in-Chief to articulate this fact, many in the US and around the globe accuse America of wrongdoing. Amazingly, not a single voice in the Obama administration seems to be able to defend its actions as lawful under a simple set of facts. Instead

of statements associated with the fact that this was a defensive action taken against a terrorist, the foundational rule of law justification has nothing to do with the fact that al-Awlaqi was a terrorist or a bad person. The justification for the lawful use of force against al-Awlaqi is as follows: (1) the US is at war with al-Qaeda under the 2001 **Authorization for Use of Military Force**; (2) the law of war applies to the war, not domestic criminal law; (3) the law of war allows the US to kill any enemy combatant on sight, detain an enemy combatant indefinitely or use military commissions when appropriate.

The New York Times editorial page of October 4, 2011 carried six letters to the editor on the topic of al-Awlaqi's death which was covered in the paper on October 1, 2011. Of those six letters, only one of them understood that the killing was an entirely lawful act carried out under the law of war. All the others reflected varying degrees of confusion over whether the US was wrong for not operating under domestic criminal law, was wrong for killing a US citizen, or that the rule of law did not really matter because al-Awlaqi was a "bad guy" and therefore his killing was justified.

With the devastating terror attacks of September 11, 2001 by al-Qaeda enemy combatants on the US, terrorism is not just another crime to be

investigated by the FBI and handed over to an Assistant US Attorney for prosecution. Whatever else the **tenth anniversary** of these attacks have signified, it is unfortunate that a decade later there still remains great public confusion when it comes to comprehending fundamental legal concepts associated with how the US conducts the war against al-Qaeda. If the terror attacks are carried out by enemy combatants such as al-Qaeda, the proper rule of law is the law of war. If the terror attacks are carried out by those inspired by radical Islam, then the proper rule of law remains domestic criminal law.

Some may argue that the fault for all this confusion rests with the lack of international consensus on relevant standards that should be adopted to deal with "international terrorism," or that the Bush administration-created phrase "War on Terror" itself is horribly vague. However, the root cause of this confusion actually centers around the inability of the US government to properly distinguish al-Qaeda enemy combatant terrorists from domestic jihadi terrorists. This confusion began in small measures in the Bush administration but is magnified to absurd degrees in the Obama administration. Obama's ill-conceived **attempts to close Guantanamo Bay**, stop **military commissions**, prosecute senior enemy combatants in federal court, and generally refuse to acknowledge to the public that the conflict with al-Qaeda is a real war, have sown mass distortion and consternation about the legality of US actions.

The reason that all this matters is that if the US is operating under the rule of law associated with domestic criminal law vis-à-vis al-Qaeda, then the US has engaged in horrid violations of domestic and international law in the past 10 years. That does not authorize the killing al-Qaeda members on sight, detaining them indefinitely without trial and using military commissions to prosecute them. On the other hand, if it is a real war then all of these actions are perfectly lawful.

In the case of Anwar al-Awlaqi, if he was a member of al-Qaeda, which he was, then he qualifies for treatment under the full parameters of the law of war. Thus, it is not a violation of the law of war for the US to kill an al-Qaeda member without warning, even if he is also a US citizen. If that US citizen is an enemy combatant then the law of war can be used as the proper rule of law to deal with him. While it is true that the **Military Commissions Act of 2006**, along with the updated **Military Commissions Act of 2009**, did exclude US citizen al-Qaeda members from trial by military commissions, this was a self-imposed rule, not a rule mandated by the law of war. In fact, at least one US citizen serving in the German military in World War II was prosecuted and executed for war crimes.

Finally, the number one threat facing the US comes from a loose confederation of radicalized violent Islamic jihadists who engage in terrorism. Some qualify as enemy combatants and some do not. Clearly, while all al-Qaeda enemy combatants can be labeled as "violent jihadists," not all violent jihadists are enemy combatants. In this light, violent jihadists that do not qualify as enemy combatants must be deemed as domestic terrorists, but violent jihadists that do qualify as enemy combatants must be treated under the law of war.

Indeed, out of all of the nascent legal and policy issues associated with the armed conflict against al-Qaeda, no factor has spawned more debate than correctly applying this separation. The inability to clearly set bright


lines of distinction between al-Qaeda enemy combatants and domestic jihadists is not just a failure in definition; it is a failure in leadership and does tremendous damage to the US commitment to abide by the proper rule of law. The US must be able to clearly distinguish between criminals and belligerents and then apply the appropriate rule of law to each category.

Jeffrey Addicott is a Distinguished Professor of Law and the director of the Center for Terrorism Law at St. Mary's University School of Law. He was an active duty Army officer in the Judge Advocate General's Corps for 20 years, retiring in 2000 at the rank of Lieutenant Colonel. Addicott also served as a senior legal advisor to the US Army's Special Forces, and is an internationally recognized authority on national security law, terrorism law and human rights law. He frequently contributes to national and international news shows, appearing on FOX News Channel and MSNBC.

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